Office-Supreme Court, U.S.
FILED
JUL 14 1982
JOSEPH F. SPANIOL, JR., CLERK

SUBJECT INDEX

	Page
A. Statement of the Case	2-3
B. Opinion and Decision Below	3
C. Jurisdiction	3-4
D. Question Presented for Review	5
E. Laws Involved	5
Argument	5-7
Reasons for Granting the Writ	5-7
Effect on Municipal and other Public Utilities	7
Conclusion	8
Appendix A—Opinion of the Michigan Supreme Court	9-22
Appendix B—Opinion of the Trial Court	23-32

INDEX TO AUTHORITIES CITED

A. E. Deloach v. Rogers et al., 268 F. 2d 928, 930	5
Gypsy Oil Co. v. Escoe, 275 U.S. 498	4
Hague v. Committee for Industrial Organization, 307 US 496, 507; 83 L. ed 1423, 1432	6
Interstate Commerce Commission v. United States, 289 U.S. 385, 77 L ed. 1273	7
State v. Mountain States Tel. & Tel. Co., 224 P 2d 155, 163	6
Theatre Control Corp. v. Detroit, 113 N.W. 2d, 783	3
United Gas Corp. v. Herd Laundries Co., 189 S.W. 2d 485	7
Washington, ex rel., Stimson Lumber Co. v. Kuydendall, 275 US 207, 212; 72 L ed 241, 245	6, 7

STATUTES

	Page
Fed. Statutes, June 25, 1948, c 646, 62 Stat. 929	5
U.S.C.A., Title 28, Sec. 1257 (3)	4, 5
U.S.C.A., Title 28, Sec. 2101(c)	4

CONSTITUTIONS

Constitution of Michigan, Art. II, Sec. 16	5
United States Constitution Amendments, Article 14, Sec. 1	5, 6, 7

IN THE

Supreme Court of the United States

No.

THEATRE CONTROL CORPORATION, a Michigan Corporation; SAUL KORMAN, d/b/a Apollo Theatre; WESTOWN THEATRE CORPORATION, a Michigan Corporation; HILLIER KILBRIDE Company, a Michigan Corporation, and all other members of the class,

Plaintiffs and Appellees,

and

ACF-WRIGLEY STORES, INC., a Delaware Corporation; DAVIDSON BROTHERS, INC., a Michigan Corporation; LOCAL 575, INTERNATIONAL BROTHERHOOD OF BRIDGE, STRUCTURAL AND STEEL WORKERS OF AMERICA, AFL-CIO,

Intervening Plaintiffs and Appellees,

v.

CITY OF DETROIT, a Municipal Corporation; BOARD OF WATER COMMISSIONERS of the City of Detroit; OSCAR A. WAGNER, Commissioner; GEORGE A. SHAFFER, Commissioner; ALFRED J. SIMPSON, Commissioner; HARVEY A. WAGNER, Commissioner; GERALD J. REMUS, General Manager of the Detroit Department of Water Supply,

Defendants and Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review decision of the Supreme Court of the State of Michigan, entered in the above-entitled cause on March 15, 1962, with Motion for Rehearing of same finally denied on May 17, 1962. (365 Mich. 432, 113 N.W. 2d 783.)

A. Statement of the Case

This is a case arising out of action of Department of Water Supply of the City of Detroit (petitioner herein) in adopting a regulation imposing a demand (extra) charge on non-water conserving air-conditioning equipment used for human and animal comfort. It was contended by plaintiffs-appellees that the charge is illegal principally on the ground that it is discriminatory and therefore deprives plaintiffs-appellees of property without due process of of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Art. II, Sec. 16 of the Constitution of Michigan (Vol. 1 Appendix of plaintiffs-appellants in lower court, p. 22a). The class represented by plaintiff approximates 6000 water rate payers.

This case does not involve the amount of the demand charges so long at it is applied to all seasonal users of water. Plaintiffs-appellees stipulated in the Trial Court that they were not raising any question as to whether or not the extra charge to users of non-water conserving equipment was excessive based on actual cost of service, (p. 1092[a] of supp. appendix, Vol. V, Plaintiffs-Appellants below), and this was confirmed by the trial judge in finding that:

> "This case, so far as the issues actually contested upon trial is a discrimination case as opposed to an overcharge case, plaintiffs conceding that they are not paying 'too much' but alleging that the whole basis of the classification is wrong * * *" (Appendix for Plaintiffs and Appellants, Vol. I, pp 56a, 57a).

The main issue in the court below was whether defendant unlawfully discriminated in singling out the one segment of seasonal users while exempting all others from the added charges.

The case also involves the matter of possible refunds to this class of customers of rates paid since inception of the demand charge in 1956. This is involved in remand to the trial court for proceeding in accordance with the opinion of the Michigan Supreme Court and could conceivably result in the repayment to this class of water users of several million dollars. (Motion for re-hearing p. 7.)

B. Opinion and Decision Below

A copy of opinion and decision of Supreme Court of Michigan, *Theatre Control Corp. v. Detroit*, 113 N.W. 2d, 783, is attached hereto, App. A.

A copy of opinion and decision of the trial court (reported in Utilities Law Reports-state 1960 C.C.H. 36, 811) is attached hereto, App. B. (Also in Vol. 1 of Plaintiffs-Appellants' Appendix below, pp. 46a to 68a).

C. Jurisdiction

In the trial court, Judge George E. Bowles, Wayne County Circuit Court, State of Michigan, upheld legality of the "demand charge."

On appeal, Supreme Court of Michigan reversed the lower court and held the charge unconstitutional as a violation of due process (113 N.W. 2d, 783 at p. 789):

> "Having concluded there was no reasonable basis for the additional demand charge here sought to be imposed, it necessarily follows that such charge was unreasonable and arbitrary and, therefore, invalid because it deprived plaintiffs of property without due process of law.
>
> "Reversed and remanded for further proceedings in accordance with this opinion." (No proceedings have yet been had on the remand, the lower court not yet having decided what if any proceedings to take by virtue of the opinion.)

Among allegations of the Amended Bill of Complaint filed in this case (Vol. 1 plaintiffs-appellants' Appendix (Below) p. 22a) is the allegation that the demand charge is ultra vires, illegal and void because:

> "It deprives the plaintiffs and other members of the class of their property without due process of law, contrary to the fifth and fourteenth amendments to the Constitution of the United States, and to Article II, sec. 16 of the Constitution of the State of Michigan."

Violation of the United States Constitution was pleaded and decision of the Supreme Court of Michigan as to illegality was premised upon a violation of the Constitution of the United States. A substantial federal constitutional question is therefore involved requiring final determination by this Court.

Jurisdiction of this court to issue a writ of certiorari is conferred by 28 USCA 1257(3) and Sec. 2101(e). *Gypsy Oil Co. v. Escoe*, 275 U.S. 498.

D. Question Presented for Review

The following question is presented for review:

Does the demand charge of the Detroit Water Board upon users (plaintiffs-appellees and the class represented by plaintiffs-appellees) of non-recirculating air-conditioning equipment used for human or animal comfort deprive such users of property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States?

E. Laws Involved

The United States Constitution Amendments, Article 14, Sec. 1.

The Constitution of Michigan, Art. II, Sec. 16.

ARGUMENT

Reasons for Granting the Writ

It affirmatively appears that in the State court there was duly drawn in question the validity of a statute of or an authority exercised under the State because of repugnance to the Constitution of the United States and a title, right, privilege or immunity is specially set up or claimed under said constitution.

> Fed. Statutes, June 25, 1948, c 646, 62 Stat. 929;
> Title 28, U.S.C.A. Sec. 1257 (3);
> *A. E. Deloach v. Rogers, et al.*, 268 F 2d 928, 930.

The question of validity of the demand charge here involved as being a taking of plaintiffs-appellees' property without due process of law in violation of the United States

Constitution (Amend. Art. 14, Sec. 1) was raised by the pleadings and duly drawn in question as we have shown and the state court's decision was based solely upon that ground of constitutional invalidity.

The Federal constitutional question was therefore properly raised in the state court to qualify for review in this court.

Hague v. Committee for Industrial Organization, 307 US 496, 507; 83 L. ed 1423, 1432.

Review by this court is requested because of misconception (which was the basis of its decision) by the state court of the force and effect of the 14th Amendment in relation to its prohibition of taking of property without due process of law as applied to rates fixed by public utilities under the circumstances of this case.

When users of utility services concede that rates charged are not excessive as plaintiffs-appellees have in this case, there is no foundation for a claim that the rates deprive them of property without due process of law.

Washington, ex rel., Stimson Lumber Co. v. Kuykendall, 275 US 207, 212; 72 L ed 241, 245.

It is only when rates fixed are so low as to be confiscatory that there can be a taking of property without due process of law and then only of the property of the public utility. There is no unconstitutional taking of property without due process of law of a utility customer even if rates are too high, and in this case there wasn't even any claim to that effect.

State v. Mountain States Tel. & Tel. Co., 224 P 2d 155, 163.

Such discrimination found by the state court because of an inequality in rates between other seasonal users of water and plaintiffs-appellees (such rates not being excessive) of itself is not ground for a holding that the charges are unconstitutional because they constitute a taking of property without due process of law.

It is not claimed by plaintiffs-appellees that they suffered any loss or damages by reason of such discrimination. Nor were any proved. *United Gas Corp. v. Herd Laundries Co.*, 189 S.W. 2d 485; *Interstate Commerce Commission v. United States*, 289 U.S. 385, 77 L ed. 1273.

Effect on Municipal and Other Public Utilities

The decision of the Michigan Supreme Court in effect holds that a consumer has a constitutional right to a reasonable utility rate under the United States Constitution, Amendment 14, Section 1. If permitted to stand as precedent, the decision of the Michigan Supreme Court would adversely affect the interest of many municipal and other public utilities throughout the country contrary to the interpretation of the Constitution (Amend. Art. 14, Sec. 1) by this court now prevailing.

Washington, ex. rel., Stimson Lumber Co. v. Kuykendall, 275 US 207, 212.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CITY OF DETROIT, a Municipal corporation;
BOARD OF WATER COMMISSIONERS, et al.,
By: ROBERT REESE,
Corporation Counsel,
VANCE G. INGALLS,
Assistant Corporation Counsel,
Attorneys for Defendants-Appellants,
1010 City-County Building,
Detroit 26, Michigan.

Dated: August 8, 1962.

APPENDIX A

Opinion of the Michigan Supreme Court

THEATRE CONTROL CORPORATION
v.
CITY OF DETROIT

1. APPEAL AND ERROR—INJUNCTION—DE NOVO—REVIEW—WATER RATES.

Review in Supreme Court of order dismissing bill to declare void additional charges for use of nonrecirculating water-cooled air-conditioning equipment used for human or animal comfort and to enjoin collection of such charges is *de novo*.

2. SAME—QUESTIONS REVIEWABLE—WATER RATES—EQUAL PROTECTION—DUE PROCESS.

Issue of denial of equal protection of the laws by virtue of the assessment of charges against the users of noncirculating water-cooled air-conditioning equipment for human or animal comfort and not against users of such equipment for commercial or industrial processing or other seasonal users of water is not determined, where such additional charge is declared to be unreasonable and arbitrary, hence, a deprivation of property without due process of law (US Const, Am 14; Mich Const 1908, art 1, §§1, 16).

Reference for Points in Headnotes

(1) 3 Am Jur, Appeal and Error §815.
(2) 3 Am Jur, Appeal and Error §838.
(3) 43 Am Jur, Public Utilities and Services §185 *et seq.*
(4) 14 Am Jur, Costs §37.

3. Municipal Corporations—Air Conditioning Equipment—Water Rates—Due Process.

Plaintiffs, owners of theatres and other enterprises in defendant city using nonrecirculating water-cooled air-conditioning equipment for human or animal comfort *held*, to have sustained their burden of proving that there was no reasonable basis for a charge for the use of such equipment in addition to the charge for actual water consumed, in order to pay for extra demand capacity of water system, hence, the additional charge was invalid as a deprivation of property without due process of law. (US Const, Am 14; Mich Const 1908, art 2, § 16).

4. Costs—Public Questions—Air Conditioning Equipment.

No costs are allowed in class suit to declare void additional charges by city upon users of nonrecirculating water-cooled air-conditioning equipment, a public question being involved.

Appeal from Wayne; Bowles (George E.), J. Submitted June 9, 1961. (Docket No. 49, Calendar No. 48,840.) Decided March 15, 1962. Rehearing applied for.

Bill by Theatre Control Corporation, a Michigan corporation, Saul Korman, doing business as Apollo Theatre, Westown Theatre Corporation and Hillier Kilbride Company, Michigan corporations, in their own behalf and in behalf of all other members of a class similarly situated, against the City of Detroit, a municipal corporation, the Board of Water Commissioners of the City of Detroit, its individual members and the General Manager of the Detroit department of water supply, to declare void additional charges imposed for use of air-conditioning equip-

ment units which do not recirculate water, to enjoin assessment of such charges and to secure accounting for and repayment of such charges already collected. ACF-Wrigley Stores, Inc., a Delaware corporation, and Local 575, International Brotherhood of Bridge, Structural and Steel Workers of America, AFL-CIO, intervened as parties plaintiff. Bill dismissed. Plaintiffs and intervening plaintiffs appeal. Reversed and remanded.

William Henry Gallagher, David Newman and *Reymont Paul*, for plaintiffs.

Irwin I. Cohn (John Sklar, of counsel), for intervening plaintiffs ACF-Wrigley Stores, Inc., and Davidson Brothers, Inc.

Donald J. Prebenda, for intervening plaintiff Local 575, International Brotherhood of Bridge, Structural and Steel Workers of America, AFL-CIO.

Nathaniel H. Goldstick, Corporation Counsel, and *Robert Reese*, Assistant Corporation Counsel, for defendants.

Robert Reese, Corporation Counsel, and *Vance G. Ingalls*, Assistant Corporation Counsel, on application for rehearing for defendants.

Amicus Curiae:

Fenton, Naderlander, Tracy & Dodge, for Elliott Amusement Company and the Riviera Theatrical Corporation.

Souris, J. This case, like *Palmer Park Theatre Co. v. City of Highland Park*, 362 Mich 326, decided by us after entry of the decree here appealed, presents for decision the validity of a municipality's imposition of an annual charge upon users of air-conditioning equipment which does not recirculate water, in addition to the charge made for water actually used. In the *Palmer Park Theatre Case* a city ordinance required annual purchase of a license at the cost of $20 per ton of capacity for each unit exceeding 5

tons. In the case at bar, the Detroit board of water commissioners on May 7, 1956, imposed an annual "demand charge", beginning at $1.50 per ton of capacity in the first year to $7.50 per ton for 1961, upon all such equipment used for human or animal comfort. The license fee in the *Palmer Park Theatre Case* and the demand charge in the case at bar were in addition to the regular charges for water actually consumed.

We held, in the *Palmer Park Theatre Case*, that the license fee there imposed was unreasonable and arbitrary, and therefore invalid, because no longer necessary to its original purpose of conserving water, additions, improvements, and repairs to the city's water system having increased its capacity to meet all foreseeable demands. A majority of this Court also held the license fee invalid because exemption of the users of such equipment with less than 5 tons of capacity was arbitrary and dicriminatary as against those users of such equipment with capacity in excess of 5 tons who were required to pay the license fee, thereby denying the latter equal protection of the laws.

Differences between the 2 cases appear from the foregoing. In the first we dealt with a city ordinance requiring purchase annually of a license for a fee; in the case at bar the board of water commissioners imposed annually an additional charge computed on the basis of the tonnage capacity of the equipment used. Another difference is that in the first case all water-cooled air-conditioning equipment of the nonrecirculating type for whatever purpose used, except equipment less than 5 tons in capacity, was required to be licensed; in the case at bar the additional charge was imposed only upon such equipment if used for human or animal comfort, but without regard to its tonnage capacity. Another significant difference in the 2 cases is that defendants made no effort to justify the annual demand charge as

an emergency water conservation measure, as was the situation in the *Palmer Park Theatre Case*. Although, as we shall see, the board of water commissioners in announcing the imposition of the additional demand charge indicated its concern over the current and future impact of air-conditioning equipment upon the water system's capacity, it was stipulated below that the system's capacity was sufficient to meet all demands of its customers for the next several years except for "spot inadequacies" and assuming lawn sprinkling could be banned if necessary.

Plaintiffs' bill of complaint was for a declaratory decree and for recovery of the additional charges already paid. After a lengthy hearing, the chancellor rendered a carefully prepared opinion in defendants' favor dismissing the bill. Our review, of course, is *de novo*.

In the city of Detroit the board of water commissioners establishes water rates, pursuant to authority expressly granted by title 4, ch 12, § 9, of the charter of the city to fix such rates "upon such basis as shall be equitable."* First, a monthly charge is imposed for water actually consumed by each customer of the system at a specified rate for the first 10,000 cubic feet, at a lower rate for the next 90,000 cubic feet and at a still lower rate for all water consumed in excess of 100,000 cubic feet. Second, a monthly service charge is imposed, which charge is a demand charge based upon the size of meter used, the charge increasing from 24¢ for a $\frac{5}{8}$-inch meter to $53.28 for a 24-inch meter. Finally, since 1957, the annual demand charge has been imposed only upon customers owning water-cooled air-conditioning equipment for human or animal comfort which does not recirculate water. This last annual demand charge

* Municipal Code, City of Detroit (1954), charter section, p 72.—REPORTER.

was announced by the board of water commissioners in May of 1956 by adoption of a new rule and issuance of an accompanying statement of explanation. The explanatory statement, substantially in its entirety, follows:

"The impracticability of supplying water for water-wasting air-conditioning equipment is becoming generally recognized by the water-works industry throughout the country—and steps are being taken to control the situation. The 2 principal methods in use are:

"(1) Prohibit by ordinance the use of water-wasting air-conditioning equipment.

"(2) Give users of air-conditioning equipment the choice of converting to the water-conserving type of equipment, or of paying the full cost of delivering water for the water-wasting air-conditioning load. This is usually done by imposition of a demand charge.

"The cost of meeting the water-wasting air-conditioning load in Detroit is over $7.50 per annum per ton of refrigeration, in excess of the charge for water consumption at current rates.

"The air-conditioning demand has practically no diversity factor. Under maximum conditions 95% or more of air-conditioning equipment will be in simultaneous operation. By comparison even the lawn sprinkling load shows less than 20% of potential in use at maximum.

"While the present air-conditioning load is something to be reckoned with, it is the future load that causes great concern. It is expected that there will be a tremendous increase in the use of air-conditioning equipment, both commercially and domestically, within the next few years. Air-conditioning tonnage in Detroit increased 9.6% during 1955. Higher rates of increase are expected.

"During 1955, over 20% of maximum hour demand was chargeable to the air-conditioning load. This means that over 20% of the plant facilities are used to meet the air-conditioning load. Twenty per cent of present plant capacity is enough to meet the maximum domestic demand of an additional population of approximately 800,000 people.

"It is obvious that either water-wasting air-conditioning must be prohibited in Detroit, or the plant expanded to meet the present and potential air-conditioning load.

"The Detroit board of water commissioners favors the addition of a demand charge to the water rate, in the belief that it will in effect prohibit new installations of water-wasting equipment, and will result in conversion of all or nearly all the water-wasting equipment now in use, and cause those, if any, who continue to use water-wasting equipment, to pay for the service rendered."

Stated simply, the principal question is whether defendants may impose an additional annual demand charge only upon users of nonrecirculating air-conditioning equipment used for human or animal comfort without violating constitutional rights of due process and equal protection of the laws.* Plaintiffs argue forcefully that exemption of water-wasting refrigeration equipment used for commercial or industrial processing, and failure to impose the additional annual demand charge upon other seasonal users of water, renders the attempted classification discriminatory and, therefore, denies them equal protection of the laws.† In our disposition of this case, however, we need

---

* Mich Const 1908, art 2, §§1 and 16; US Const, am 14, §1.

† See the majority opinion in *Palmer Park Theatre Co. v. City of Highland Park*, 362 Mich 326.

not consider this issue, for it is our conclusion that the additional annual demand charge was unreasonable and arbitrary and, therefore, deprived plaintiffs of property without due process of law.

The chancellor ruled that the demand charge was valid. He found that because such equipment was used only during the summer months and that then virtually all of such equipment operates simultaneously, particularly on the day and at the hour of peak demand upon the system, great demand is thereby placed upon the water-producing capacity of the city's system, necessitating it to maintain substantial capacity in excess of its customers' normal needs. He concluded that the cost of providing water for such use was greater than for other uses, thereby justifying the additional demand charge.

Plaintiffs contend that the chancellor erred in his findings that virtually all of such equipment is in use simultaneously and that such simultaneous use occurs at the peak hour of demand. From these factual errors, plaintiffs claim the chancellor was led to his erroneous conclusion that the water system's excess capacity was required to meet the peak demands of such equipment, the users of which should, therefore, bear the cost of maintaining such excess capacity.

There were offered by defendants statistical tables and charts prepared by their expert witnesses and the water system's staff which support the chancellor's findings and conclusions. One such group of tables purports to allocate the system's costs and revenues to various customer classifications: domestic, commercial, industrial, United States government, semicharitable, construction, suburban, and nonrecirculating air-conditioning equipment used for hu-

man or animal comfort. A very great use of test data and estimates was required to accomplish the allocation. The technique used for determining water consumption by non-recirculating air-conditioning equipment used for human or animal comfort, preliminary to the allocation of costs and revenues thereto, is found in the direct examination of William Paterson, defendants' expert witness, who at this point was testifying from a previously prepared report:

"A. In developing the cost of service to nonconserved [nonconserving?] air-conditioning equipment it is first necessary to develop the water-use characteristics of this type of equipment. From the department of water supply files, test data are available on water-usage characteristics of customers using air-conditioning equipment of the nonconserving type.

"This data includes maximum hourly rates of water use and average daily use, for the days of test readings. Tonnage installed, monthly water consumption, and revenues received were also available. With this data we were able to estimate the maximum and average annual rates of water used by, and the annual revenue received from, the average ton of nonconserving type air conditioning.

"Q. Will you tell us your studies concerning the characteristics of water use by this equipment.

"A. From the test readings collected on 39 customers, representing a total of 7,767 tons, during the days of July 6, 7, 8, 21, 22, 23, 26, and 27, 1955, we have tabulated the maximum hourly rate of usage for each of these customers during those specific days.

"Q. Is this the maximum rate of water which you estimated was used for the air-conditioning equipment?

"A. No, this rate of usage included all water used on the premises at the time of test readings, and it is necessary to reduce the actual observed

peak hourly rate in order to obtain the maximum hourly rate of use by air-conditioning equipment proper.

"Q. Then will you explain how you determined the maximum hourly rate of use by the air-conditioning equipment?

"A. We estimated the water use for purposes other than air conditioning by use of comparative consumption statistics on water use of similar customers without air-conditioning equipment. Basically, variation in winter to summer use of similar classes of customers varies as a group on a comparable basis disregarding use for air conditioning.

"We found that non-air-conditioning commercial customers showed a maximum hourly use of approximately 3 times the average winter use. The average maximum usage of the air-conditioning customers, for purposes other than air-conditioning, was estimated by applying this relationship of usage to the winter consumption.

"The peak hourly rate of water consumption, as recorded by test readings for the group of air-conditioning customers, was reduced by the amount of the estimate hourly rate for the customer group for uses other than air conditioning, to obtain a peak hourly rate representing the water usage by the nonconserving air-conditioning equipment. By relating this total peak hourly rate to the tonnage of equipment in operation by these customers, we have determined a maximum hourly rate of water used per ton of nonconserved [nonconserving?] air-conditioning equipment.

"Q. What was this rate?

"A. The maximum hourly rate, average for the group, was 1.346 gallons per minute per ton.

"Q. How does this rate of usage per ton compare with general engineering theory concerning maximum rates of usage for this type equipment?

"A. Due to varied conditions that may govern for specific intallations, the maximum rate could vary from 1 to 2 gallons per minute, but generally it can be said that air conditioning of the nonconserving type in this area will use about 1.5 gallons per minute when operating under full design load.

"Why did you not use the higher maximum rate of 1.5 gallons per minute?

"A. If this rate were considered to be the maximum rate of usage and was applied to the total tonnage in the system, it would be necessary to apply a diversity factor to allow for units not in operation for 1 reason or another, or for units not operating at full capacity. Any diversity in air-conditioning use would be small as the heat of the day lasts for several hours and those with air conditioning would tend to be using it at the same time, with the result that on days of high temperatures practically all units would be operating at full capacity.

"If we were to assume as much as a 90% factor for diversity, the maximum rate of usage for the groups would be 90% times 1.5 gallons per minute or 1.35 gallons per minute, or nearly the same rate which we found by analysis of the data collected on the 39 test customers.

"The Court: May I interpolate a question. When you use the 90% factor for diversity, do you mean as a method of computation you are assuming that 10% of those who had such equipment were not using it at that time; is that what you mean by 90% diversity?

"A. Yes, that is what I mean and that would be under maximum conditions of use.

"Q. (By Mr. Reese): Did you complete your last answer?

"The Court: I stopped him.

"Q. Will you continue?

"A. We believe that the derivation of the maximum hourly rate of use by this type of equipment

which is based on the test data collected for the selected days of reading, provides a reasonable accurate basis for preparing our cost-of-service study.

"Q. What water-use characteristics, other than the maximum hourly rate, must be determined?

"A. The total annual consumption by this type of equipment must also be determined. This consumption was determined by use [of?] the 39 test customers' total annual consumption, less 6 months at the average winter-use rate and 6 months at the average summer-use rate, exclusive of air-conditioning use computing the summer rate as 1.20 time the winter-rate average.

"Air-conditioning consumption for the 1958 fiscal year, the most recent year of record, was estimated to average 42,400 galons per ton for the 7,852 tons installed, and this average usage per ton was used as representative for the total tonnage installed in the system."

From the foregoing it is evident that defendants' witness used 1955 test data taken from only 39 customers (all located in downtown Detroit) whose nonrecirulating air-conditioning equipment totaled 7,767 tons as a basis for estimating all other data relating to all such equipment subjected to the annual demand charge. At the time of hearing below, early 1959, there were approximately 6,000 such units having a total rated tonnage of 75,000.* Furthermore, as a basis for estimating theoretical maximum potential demand for water by such equipment (based upon which estimate other computations were made) it was assumed that 90% of all units would be operated simul-

* There were 17,000 refrigeration units of all types licensed by the city at the end of 1958, the total tonnage of which was 171,000. In addition to the 6,000 units subject to the annual demand charge, with a total rated tonnage of 75,000, there were 11,000 units totaling 96,000 tons, equipment which recirculated water or nonrecirculating equipment used for commercial or industrial processing.

taneously at the peak hour of demand by such equipment. No basis other than the witness' judgment and the estimated use of such equipment by the test customers was suggested for this assumption. Other judgment figures were relied upon, some of which were frankly stated to have been generally based upon past experience in other cities under different circumstances of climate. The foregoing suffices to demonstrate the tenuous nature of the statistical data supporting the expert witness' opinion testimony defendants rely upon to uphold the chancellor's findings and conclusions.

Included in the 6,000 units of equipment subject to the annual demand charge is equipment operated by the theaters, department and specialty stores, drug stores, office buildings, banks, restaurants, supermarkets, public and private halls, churches and the like, located in all parts of the city. A sampling of 0.65% of the number affected, but involving over 10% of the tonnage affected, suggests to us a high probability that conclusions therefrom will not be representative of the entire group. Particularly is this so when all 39 samples are located in the heart of the city and most operate only during the daylight hours of a commercial center's normal business day, as contrasted with other users of such equipment,—for example, the neighborhood theaters owned by some of the plaintiffs. What we are concerned with here is the demand for water placed upon the system at its peak hour of demand during any particular year, for the additional demand charge is sought to be justified on the basis that the cost of maintaining the system's excess capacity, claimed to be made necessary by the nonrecirculating air-conditioning equipment used for human or animal comfort, should be borne by users of such equipment. The evidence shows that this peak hour for the entire system occurred between the

hours of 6 and 8 in the evening, but the peak hour for the 39 downtown customers occurs earlier in the afternoon. The percentage of equipment in use at any 1 time for such select customers was not demonstrated to have any relationship to the percentage of all such equipment in use at the system's peak hour of demand. The data from the sampling was crucial to defendants' contention, and the chancellor's conclusion, that the water system's excess capacity was required to meet the peak demands of such equipment and that, therefore, the owners of such equipment should bear the cost of maintaining such excess capacity. It is our conclusion that plaintiffs carried their burden of proving there was no reasonable basis for the addition of a demand charge upon nonrecirculating air-conditioning equipment used for human or animal comfort.

Furthermore, the record amply supports plaintiff's claim that lawn sprinkling and other household uses occurring on the water system's peak day and at its peak hour of demand impose a substantially greater strain upon the system's capacity than does the use of equipment singled out by defendants to bear the cost of maintaining the system's excess capacity.

Having concluded there was no reasonable basis for the additional demand charge here sought to be imposed, it necessarily follows that such charge was unreasonable and arbitrary and, therefore, invalid because it deprived plaintiffs of property without due process of law.

Reversed and remanded for further proceedings in accordance with this opinion. No costs, a public question being involved.

Dethmers, C. J. and Carr, Kelly, Black, and Kavanagh, JJ., concurred.

Otis M. Smith and Adams, JJ., took no part in the decision of this case.

APPENDIX B

OPINION OF THE TRIAL COURT

Number 432—53 New Decisions 36,811

THEATRE CONTROL CORPORATION ET AL. V. CITY OF DETROIT ET AL.

Michigan Circuit Court, County of Wayne, May 26, 1960.

Municipal water rates—Demand charge on air conditioning equipment users—Validity. An action against a municipality by certain consumers of water supplied by the municipality's water department in connection with their operation of non-circulating air conditioning equipment and brought for the purpose of having a so-called demand charge declared void and the imposition and collection of such charge enjoined was dismissed. It was held that the municipality has the power to fix rates based upon considerations other than the amount of water used, and that a surcharge imposed on the principle of a ready-to-serve charge was valid under the municipality's charter. Furthermore, the non-circulating air conditioning equipment use was distinguishable in its characteristics from other uses so that the classification was a constitutional one. Thus, while there was an adequate supply of water to meet current needs, a charge based upon readiness-to-serve was nevertheless valid.

This action is brought by plaintiffs * * * suing on their own behalf and on behalf of all other ratepayers in Detroit similarly situated who likewise consume water supplied by the defendant Detroit Department of Water Supply in connection with their operation of non-recirculating air conditioning equipment.

* * * * *

Stated generally, plaintiffs bring a class action against defendant for its imposition of a so-called demand charge computed upon the tonnage capacity of the coolage system, the demand charge being $1.50 per ton of refrigeration for the calendar year 1957, progressively to be increased to $7.50 per ton for the calendar year 1961 and thereafter.

* * * * * *

The demand charge is in addition to rates charged plaintiffs and other similarly situated, for water actually consumed at the rates regularly charged to all other consumers of water. Plaintiffs seek a decree that the demand charge is void, request that defendants be permanently enjoined from imposing and collecting the demand charge, pray for an accounting as to the amounts of demand charges heretofore collected by defendants from all members of the plaintiffs' class and request that said sums be paid into court and redistributed to members of the class after deduction of costs of litigation and payment of reasonable attorney fees.

In their opening statement plaintiffs set forth the following propositions:

(1) That since the Department of Water Supply is a creature of the Charter of the City of Detroit, and since under Chapter XII, Section 9, of the Charter the Board is given the authority to fix and assess water rates upon such basis as shall be equitable, the Charter limits the authority of the Board to fix water rates in relation to the use of water, and does not authorize the Board to impose any charges other than those based upon the amount of water consumed. It is therefore urged that no charge is valid, and any charge is beyond the powers of the Department.

* * * * * *

(2) That the assessment of the demand charge upon air conditioning equipment users of the non-recirculating type for human comfort, and the exclusion of all users of air conditioning equipment for other purposes such as for preserving food or for industrial and commercial processes is discriminatory.

(3) That even conceding, arguendo, that the so-called NCAC use is distinguishable from other summer uses, the charge itself is unlawful and discriminatory as between members of a class because of the great variations within and among members of the class.

(4) That since the system is now operating profitably, no additional charge or revenue is required.

(5) That since the demand charge was adopted on May 7, 1956, and since some of the party plaintiffs installed their NCAC equipment prior to that date, the demand charge is confiscatory and unreasonable and constitutionally offensive.

* * * * *

[.01 Judicial Review Discrimination Case]

The rule most generally prevailing as to judicial review of utility rates is that a court is empowered to pass upon the reasonableness of a rate but may not set a new rate since it is not a regulatory body.

The familiar presumptions are indulged in favor of rate-making bodies; rates are presumed to be reasonable and the one charging unreasonableness has the burden of proof thereon. * * *

This case * * * is a discrimination case as opposed to an overcharge case, plaintiffs conceding that they are not paying "too much" but alleging that the whole basis of the classification is wrong, since it is claimed that the NCAC

classification is either not broad enough, because it does not contain other seasonal users such as breweries, dairies, ice plants and the like, and, further, because it does not contain year-round commercial and industrial refrigeration; or that it is not refined enough as a classification, constitutionally, because there is a marked variation between and among NCAC customers.

* * * * *

Plaintiffs have also raised the question of a claimed vested right in a rate, since some of the equipment was purchased and was operating prior to 1956. I believe that preferential treatment can not be given to customers because they are claimed to be old, as opposed to new customers, and that such distinction would constitute unlawful discrimination. * * * As to the rate of earnings of the subject defendant utility, the 1958 return was 3.2 per cent, which included, of course, the disputed NCAC charge; this return, in my judgment, falls easily within permissible limits since a municipal corporation operating a utility is not precluded from earning a fair return. * * *

It is conceded that the operation of a publicly owned utility by defendant City is governed by the same general duties and obligations applicable to a privately owned utility and it is prevented, constitutionally, from unreasonable discrimination * * * This is not to say that the profit to be enjoyed is the controlling consideration; rather there is an obligation of providing public utility service at a reasonable cost, but the public authority can make a fair return in so doing. * * * It is held * * * that the use to which water is put can not, by itself, be made the reason or basis for a separate rate classification * * * This would seem patently clear, since a municipal utility could not discriminate between and among users on the basis of their use,

assuming that all of the uses were lawful and were not contrary to the general public interest or inconsistent with the health, welfare and safety of the community. It has been frequently held * * * that a difference in rates for a utility product based upon use is a wholly inadmissible basis of discrimination. * * *

I also held that readiness to serve is one of the considerations that a utility authority may use in determining proper charges for water. Fundamentally, the operating authority must make a reasoned determination as to what demands will be placed upon its system at a given day or hour, and certainly it is on the better side of prudence and good management to make a conservative calculation based upon the high hour of the high day and to ascertain what demands will be made upon the system by any and all needs for water at that time. If a group of customers place an unusual and distinctive burden upon the system at peak demand, it is not unreasonable, or constitutionally offensive, to determine a rate or charge for that group of customers based in part upon the readiness of the system to serve at the peak hour, keeping in mind, too, any additional capital investment that is requisite to meet the peak hour.

[.02 Inequities]

Plaintiff urges with considerable persuasion that the subject charge is offensive because of the inequities between members of the assumed class in violation of Section 9 of Chapter XII of the Detroit City Charter. It is said that this must be so because there is a great variance in the extent of use of the equipment because there is a great fluctuation in the amount of water used by one ton of air conditioning * * * and because, finally the naming of an Adjustment Committee by the Board of Water Commissioners itself recognizes inequity.

As to a vested interest in the former charge, plaintiffs urge that it is economically impossible for them to install expensive conservation devices to be used for relatively short periods of their unexpired leases, note also that the physical characteristics of buildings preclude installations, and allege that all members of the class installed their air conditioning of the non-recirculating type in the reasonable expectation that water would be used and paid for at the old or regular rates.

[.03 Reasonable Classification—Justifiable Distinctions]

While in this type of case one is frequently tempted to oversimplify, it is believed that the central factual consideration upon which the rather familiar principles of law must operate is the question whether or not the NCAC customers possess unique characteristics and distinguishing factors that justify singling out NCAC customers from other summer uses, as it were, and the secondary question flowing therefrom is: Assuming that there are such distinguishing characteristics justifying a separate class, are there sufficient variations as between and among members of the class as to render the classification too broad?

* * * * *

The Supreme Court of the State of Oregon held that a charge against apartment house owners as distinguished from hotels, motels and single residences was discriminatory, and, in reviewing the law in such cases, observed, *inter alia:*

> "In the first place, it is eminently clear that a charge for water need not be based entirely upon the amount of water actually used. It is the common and legally accepted practice to fix minimum rates which a customer must pay even though he uses less

than the minimum amount of water for which the charge is paid. This minimum rate is in effect a service charge for those customers who use less than the minimum amount, differing only from a fixed service charge unrelated to a minimum quantity of water in that under a minimum rate the charge is absorbed when a minimum quantity of water is used. * * *"

* * * * *

"A municipal utility is entitled to make differentiations in the rate charged for water if those differentiations are based upon a proper classification. * * *"

"Whether differences in rates between classes of customers are to be made, and if so, the amount of the differences, are legislative rather than judicial questions, and are for the determination of the governing bodies of the municipalities. The presumption is in favor of the legality of the rates established by the rate-making authority, and courts may interfere only in clear cases of illegality. * * * The burden of proof is upon the party alleging that the * * * differences in rates is disproportionate to the difference in conditions."

The opinion goes on to reason that if differences in conditions can not be shown, then all customers are entitled to receive the same service on an equal basis and at a uniform rate; the differences upon which the classification is predicated must have a reasonable relationship to the purpose for which the classification is made, or, stated another way, the classification must rest upon a difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.

* * * * *

The court noted analogous situations wherein it was held that in the absence of differences relating to supplying the

services, it is unjust discrimination to charge one rate to stockyards and railroads and another rate to laundries or one rate to general manufacturers and another to laundries, or one to laundries and restaurants and another to domestic and other consumers.

* * * * *

The court discussed distinctions between apartment houses and hotels and reasoned that in imposing charges for water the distinctions were not important unless they could be pointed to as the reason for imposing a different cost on persons in the two classes established.

* * * * *

As related to the instant case, then, the ultimate question is whether those distinctions which have been shown by defendant are more than word choices and whether, in fact, they are distinctions that can be justified in the light of the purpose for which the classification was created. The distinctions are not persuasive, are not reasonable and are, therefore, not constitutionally sound, unless the distinctions can be pointed to as a reason for imposing a different cost on NCAC customers than the cost imposed on other summer uses, particularly sprinkling. If the difference in use and the other differences, that is the characteristics of the use do not distinguish NCAC customers from other customers the classification must fail.

In the Kliks case the Supreme Court of Oregon found that the claimed differences in use, that is, the manner of occupancy and the other differences relied upon, were not established and that the classification was, therefore, unreasonable.

* * * * *

It is my holding that the classification by defendant city here is a reasonable classification and justified by differences in use, or stated another way, by distinctions in characteristics of use between members of the classification and other summer uses. The load factor between members of the classification and non-members is different. The reliability factor is distinguishable, the sprinkling uses, for example, being subject to limitation in an emergency through ordinance provisions or through voluntary controls. The diversification factor is less favorable since there is a concentrated use by virtually all users of NCAC equipment during the hottest day, and, indeed, at the hottest hour of the hottest day. These differences in the characteristics of use, in result, require the planning of capital improvements and the re-enforcement of the system to meet the peak day and the peak hour. While the City, in law, could have prohibited the use of this type of equipment, it chose rather to permit the continuance of its use under regulation. It is my judgment * * * that the defendant established that the cost of service to this class of users was greater and different from the cost of service for other summer users, and that a ready-to-serve charge was justified.

[.04 Conclusion]

It is therefore held:

1. That the City of Detroit through its Department of Water Supply is empowered to fix a rate or rates based upon considerations other than the amount of water used.

2. That a surcharge imposed upon NCAC customers on the basis or principle of a ready-to-serve charge is valid under the Charter, specifically Chapter XII, Sec. 9.

3. That the NCAC use is distinguishable in its characteristics from other summer uses so that the classification is a constitutional one.

4. That it would have been improper to distinguish between prior users of NCAC equipment as opposed to more recent or new users.

5. That while it was stipulated that there is an adequate supply of water to meet current needs, a charge based upon readiness-to-serve is nevertheless a valid charge for the reverse would mean that because there was an adequate supply of water, no users could be required to pay the actual cost of service to them, it having been established by competent proofs that the cost of service to NCAC customers is greater than the cost of service to other summer users.

6. That while the use to which water is put is not a proper basis for constitutional classification, differences in the characteristics of use do justify a separate classification for NCAC users.

For the foregoing reasons the bill may be dismissed.